No. _____

IN THE

# Supreme Court of the United States

SIX WEST RETAIL ACQUISITION, INC.,
*Petitioner,*

v.

SONY PICTURES ENTERTAINMENT CORPORATION, SONY CORPORATION, SONY CORPORATION OF AMERICA, SONY ELECTRONICS CORPORATION, SONY THEATRE MANAGEMENT CORPORATION, TALENT BOOKING AGENCY, INC., LOEWS FINE ARTS CINEMAS, INC., LOEWS THEATRE MANAGEMENT, JAMES LOEKS, BARRIE LAWSON LOEKS, TRAVIS REID, THOMAS BRUEGGEMANN AND SEYMOUR H. SMITH,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

Jeffrey H. Howard
*Counsel of Record*
Clifton S. Elgarten
Kent A. Gardiner
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 624-2500

## QUESTIONS PRESENTED

1. Where a film distributor is engaged in block-booking with exhibitors, does the antitrust law require independent evidence that the block-booking actually "coerced" the exhibitors to carry unwanted films?

2. Is forcing consumers to see their first choice film at their second choice theater, or their second choice film at their first choice theater, actionable injury to competition under the antitrust laws?

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Six West Retail Acquisition, Inc. does not have a parent corporation and no publicly held corporation owns 10% or more of the corporation's stock.

## TABLE OF CONTENTS


Page

QUESTIONS PRESENTED ..... i
RULE 29.6 CORPORATE DISCLOSURE STATEMENT ..... ii
TABLE OF AUTHORITIES ..... iii
OPINIONS BELOW ..... 1
JURISDICTION ..... 1
STATUTORY PROVISION INVOLVED ..... 1
STATEMENT ..... 1
A. Six West's Business ..... 2
B. The Lawsuit ..... 3
C. The District Court's Decision ..... 5
D. The Second Circuit's Decision ..... 6
REASONS FOR GRANTING THE PETITION ..... 7
1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF THE 9TH AND 11TH CIRCUIT COURTS OF APPEAL AS TO WHETHER BLOCK-BOOKING REQUIRES INDEPENDENT EVIDENCE OF ACTUAL "COERCION" IN ORDER TO VIOLATE SECTION 1 OF THE SHERMAN ACT ..... 8
a. The Need For Independent Proof of "Actual Coercion" ..... 10
b. The Record Evidence ..... 12
2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF THE 9TH AND 11TH CIRCUIT COURTS OF APPEAL AS TO WHETHER BLOCK-BOOKING REQUIRES INDEPENDENT EVIDENCE OF ACTUAL "COERCION" IN ORDER TO VIOLATE SECTION 1 OF THE SHERMAN ACT ..... 16
CONCLUSION ..... 19

## TABLE OF AUTHORITIES

**Page**

**Cases:**

*Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,
472 U.S. 585 (1985) ..... 18

*Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123
(6th Cir. 1981) ..... 15

*Eastman Kodak Co. v. Image Technical Servs.*,
504 U.S. 451 (1992) ..... 10

*Hill v. A-T-O Inc.*, 535 F.2d 1349
(2d Cir. 1976) ..... 15

*Independent Ink, Inc. v. Illinois Tool Works, Inc.*,
396 F.3d 1342 (Fed. Cir. 2005) ..... 2, 7, 12, 16

*MCA Television Ltd. V. Public Interest Corp.*,
171 F.3d 1265 (11th Cir. 1999) ..... 7, 11, 12

*Mulvey v. Samuel Goldwyn Productions*,
433 F.2d 1073 (9th Cir. 1970), *modified*,
1970 U.S. App. LEXIS 6185, *cert. denied*,
402 U.S. 923 (1971) ..... 7, 11, 12

*Northern Pacific Railway v. United States*,
356 U.S. 1 (1958) ..... 9

**TABLE OF AUTHORITIES – Continued**

**Page**

*Reborn Enterprises Inc. v. Fine Child Inc.*,
590 F. Supp. 1423 (S.D.N.Y. 1984),
*aff'd*, 754 F.2d 1072 (2d Cir. 1985) ..... 15

*Toys "R" Us, Inc. v. Federal Trade Commission*,
221 F.3d 928 (7th Cir. 2000) ..... 2, 8, 17, 18

*United States v. Loew's Inc.*, 371 U.S. 38
(1962) ..... 2, 4, 7, 10, 12

*United States v. Paramount Pictures, Inc.*,
334 U.S. 131 (1948) ..... 4, 7, 9, 11, 12, 17

*United States v. Twentieth Century Fox Film Corp.*,
882 F.2d 656 (2d Cir. 1989) ..... 7

## PETITION FOR A WRIT OF CERTIORARI

Six West Retail Acquisition, Inc. ("Six West") respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. 1a-3a) is not reported. The opinion of the district court (App. 4a-50a) is unofficially reported at 2004-1 Trade Cas. (CCH) ¶ 74,361.

## JURISDICTION

The court of appeals' judgment was entered on March 30, 2005. App. 1a. A timely petition for rehearing was denied on June 22, 2005 (App. 132a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act (15 U.S.C. § 1) provides in pertinent part that: "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."

## STATEMENT

This case raises an important and recurring question under Section 1 of the Sherman Act relating to the presumption of market power and associated coercion when film distributors condition access to one group of desired films on the exhibitor's agreement to take another group of undesired films. This Court and at least two courts of appeal

have long held that "the requisite economic power may be found on the basis of either the uniqueness or consumer appeal" of the film and that such power may be presumed when the tying film is copyrighted. *United States v. Loew's Inc.*, 371 U.S. 38, 45 (1962). As a result, there is no need to prove "actual coercion" beyond that which inheres in the block-booking arrangement itself. The decision below squarely conflicts with these rulings and thus warrants review to resolve this conflict.

Moreover, the Court has just recently granted review of a related case arising from the presumption of market power and coercion in the case of a patented tying product. *Independent Ink, Inc. v. Illinois Tool Works, Inc.*, 396 F.3d 1342 (Fed. Cir. 2005), *cert. granted*, 73 U.S.L.W. 3733 (U.S. 2005). As part of this review, the Court should also consider the antitrust rules relating to the block-booking of copyrighted films.

In addition, this case presents another important issue of antitrust law and policy – namely, whether conduct which seriously reduces consumer choice by, for example, forcing consumers to see their first choice film at their second choice theatre, or vice versa, injures competition within the meaning of Section 1 of the Sherman Act. The decision below held that it did not. App. 24a. This too squarely conflicts with a decision of the Seventh Circuit Court of Appeal that such reductions in consumer choice are cognizable under the antitrust laws. *Toys "R" Us, Inc. v. Federal Trade Commission*, 221 F.3d 928 (7th Cir. 2000).

### A. Six West's Business

Six West is the owner of two current Manhattan movie theatres and one other Manhattan theatre that closed in 1994: The Twin Theatre at 66th & 2d Avenue; The Paris, on 58th Street right across from the Plaza Hotel, and the

Festival which was one block off Fifth Avenue on 57th Street, but has since closed.

During the period relevant to this case, Loews operated movie theatres in Manhattan and around the United States. Six West first entrusted the operation of the Twin Theatre to Loews in the 1970s based on Loews' agreement to operate the Twin as a prestige, first-class theater like Loews' own. This relationship expanded to the Festival and Paris in 1990. Loews management responsibilities included booking films for all three Six West theatres. The parties agreed to split the net profits of the theatres 60% for Six West and 40% for Loews.

Sony is a distributor of films which are shown in theatres in Manhattan and throughout the United States. It acquired Loews in 1989 and continued to own Loews until May, 1998.

**B. The Lawsuit**

Six West filed this action on July 24, 1997, seeking damages and injunctive relief and asserting antitrust, breach of contract and tort claims with respect to each of the theaters. Defendants included various Loews entities, various Sony entities, including Sony Pictures, and certain individuals. An Amended Complaint adding certain additional antitrust claims, no longer relevant to the case, was filed on December 4, 1997.

At the core of Six West's claims was the allegation that Sony Pictures had engaged in block-booking with exhibitors other than Loews and Six West in the relevant areas of Manhattan. Block-booking is a *per se* violation of section 1 of the Sherman Act which occurs when a film distributor conditions an exhibitor's access to desired films on its agreeing to take less desired films or a block of films.

*United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948). It is a doctrine created by this Court to prevent widespread anticompetitive behavior in the motion picture industry.[1] Moreover, this important, long-established doctrine was circumvented by the lower courts in this case.

This type of block-booking, Six West alleged, injured it by depriving it of access to Sony films for its Twin Theatre. The record shows that for a nine year period when the Twin hungered for new films, it never got access to a single Sony film.

As a result, in early 1996, Six West wrote to Loews (known then as Sony Theatres[2]) specifically asking it to obtain access to the much desired Sony feature film – *Sense and Sensibility* – for the Twin. Loews responded by explaining the facts of film booking life to Six West:

> Please keep in mind that if we were to decide to attempt to change our relationships on the east side of New York this business does not work in such a way that we would only play 'Sense and Sensibility,' but that ***we would become obligated to play a full portion of the Sony Pictures release schedule.*** [App. 134a (emphasis added).][3]

---

1 *See, e.g., United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *United States v. Lowe's, Inc.*, 371 U.S. 38 (1962).

2 In 1994, Loews Theatre Management Corp. changed its name to Sony Theatre Management Corp.

3 During that 9 year period, of the Sony films shown on the East Side of Manhattan, two exhibitors – Cineplex and United Artists – showed 99.5% of them.

In March 2000, Judge Edelstein substantially denied Loews' and Sony's motions to dismiss, finding that Six West had properly alleged block-booking by the Sony entities. Judge Edelstein expressly found that:

> those letters present adequate facts indicating that ***the Sony Corporate Entities engaged in block-booking practices that adversely affected Plaintiff.*** App. 85a (emphasis added).

In addition, Judge Edelstein concluded that the complaint stated valid claims of illegal booking relationships by Loews with other film distributors (which he referred to as "relationship licensing"), and for breach of the management agreements with respect to each of the theaters. *Six West v. Sony*, No. 97 Civ. 5499, 2000 WL 264295 (S.D.N.Y. Mar. 9, 2000) (App. 130a-131a). Following Judge Edelstein's death, this case was reassigned to Judge Preska on September 26, 2000.

### C. The District Court's Decision

By order entered March 31, 2004, the district court granted Loews' and Sony's motions for summary judgment on all claims. The district court acknowledged that block-booking is *per* se illegal under section 1 of the Sherman Act. App. 14a. In addition, the court recognized that block-booking "is 'the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period.'" *Id.*

Although Six West had adduced evidence demonstrating that Sony had conditioned access to desired films on the acceptance of undesired films (*i.e.*, block-

booking), according to the district court, Six West had failed to prove that Sony had "coerced" any exhibitor to show its films. The district court emphasized repeatedly that it was this failure to establish "coercion" which caused the claim to be dismissed. (E.g., "no evidence . . . that there was any 'actual coercion,'" "the evidence fails to suggest [they] attempted to coerce anyone," "[n]owhere . . . does [he] imply any type of coercion," "evidence . . . is insufficient . . . to infer that [Sony] coerced any exhibitor"). App. 16a, 17a, 19a-20a. In the district court's view, proof of block-booking arrangements alone is apparently not sufficient to establish actionable coercion under the antitrust laws.

Six West had adduced evidence that demonstrated that (1) Sony had refused its request for access to a desired film unless it agreed to take the block of the year's full release schedule, (2) Sony had threatened other exhibitors with refusals to deal unless they showed undesired films for extended periods, (3) Sony dealt exclusively with two other chains on the east side of Manhattan (United Artists and Cineplex) who undoubtedly complied with th[illegible] demands, and (4) this policy effectively denied Six West access to all Sony films for more than nine years.

The district court also dismissed the claim against the Loews entities for illegal relationship film licensing under the Rule of Reason. The lower court held, *inter alia*, that Six had failed to prove injury to competition caused by Loews' challenged relationships. In its view, a reduction in consumer choice which would force Manhattan movie goers "to see his or her first choice movie at his or her second choice theatre or his or her second choice movie at his or her first choice theatre . . . is not an actionable restraint of trade." App. 24a.

### D. The Second Circuit's Decision